IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6215 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ARJUNBHAI K VEGDA

Versus

TEJVIR PARK CO-OP HOUSING SOCIETY LTD

Appearance:

1. Special Civil Application No. 6215 of 1993

MR TUSHAR MEHTA for Petitioner No. 1

MR SV PARMAR for Respondent No. 1-4

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 31/07/2002

ORAL JUDGEMENT

1. The short facts of the case are that the

petitioner was the member of respondent No.1 society. It is the case of the Society that certain amounts were required to be paid by the petitioner to the respondent society and they were not paid in spite of the demand and, therefore, on 30-11-1975 a resolution was passed at the general board meeting of the respondent society for expelling the petitioner as the member of the society. It appears that when it came to the notice of the District Registrar on 27-5-1976, the District Registrar addressed a letter to the Chairman of the respondent Society that the resolution passed at the general board meeting would not become effective on its own and as per the Section 36 of the Act, a proposal is required to be submitted to the District Registrar and, thereafter the procedure is required to be undertaken. If such proposal is not submitted, the action shall be unconstitutional or illegal. Thereafter, the District Registrar, once again has addressed a letter dated 17-6-1976 to the Chairman of the respondent Society reiterating the same. However, it has been stated in the said letter that the earlier letter dated 15-12-1975 forwarded by the respondent Society to the office of the District Registrar is not a complete proposal and, therefore, the society was instructed to forward proper proposal and it was also said that since no permission is granted the resolution for expelling the petitioner would not become effective. Thereafter, once again on 15-7-1976, the letter was addressed by the District Registrar to the respondent society, calling upon the respondent society to produce the copy of the resolution etc., for taking appropriate action. When the aforesaid came to the knowledge of the petitioner on 28th September, 1976, the petitioner preferred lavad suit No.2678/1976 before the Registrar's Board of Nominees for declaring the resolution dated 30-11-1975 as illegal and void. The contention of the petitioner in the said suit was that the mandatory requirement for passing the resolution under Section 36 of the Act for giving opportunity etc., is not followed and, therefore, resolution is null and void. In the said suit, the respondent herein appeared and, thereafter the issues were framed and deposition was also recorded of the plaintiff on 5th December, 1981. Thereafter in the year 1990, it appears that the application Ex.58 came to be submitted by the respondent Society contending that there is no jurisdiction with the learned Nominee under Section 96 of the Act for entertaining the suit since the matter is pertaining to the expulsion under Section 36 of the Act. The learned Nominee passed the order dated 13-11-1991 below Application Ex.58 and allowed the application and declared that he has no jurisdiction to entertain the suit and, therefore, the suit is dismissed.

The petitioner preferred appeal No.367/1991 before the Gujarat State Cooperative Tribunal and the learned Tribunal ultimately for the reasons recorded in the judgement and order dated 26-2-1993 dismissed the appeal and confirmed the order of the learned Nominee. Under these circumstances, the petitioner has preferred this petition.

2. Mr.Ketan Shah, learned counsel appearing with Mr.Tushar Mehta, learned Counsel, has submitted that since there is no decision of the District Registrar of either granting approval or of not granting approval under Section 36 of the Act, the petitioner cannot prefer the appeal and he submitted that the challenge in the suit is regarding the legality and validity of the resolution and, therefore, judgement in the case of "Jitendra Natverlal Thaker & Ors. v. Hirabag Co-operative Housing Society Ltd. & Ors.", reported in 1978 (Vo.19) GLR, 92 would not be applicable since the petitioner, who is plaintiff in the suit has challenged the legality and validity of the resolution on the ground that the mandatory procedure is not followed. He submitted that when the appeal cannot be preferred in absence of the decision of the District Registrar, it cannot be said that the jurisdiction under Section 96 of the Act is ousted or there is no jurisdiction with the Nominee to entertain the suit.

3. On behalf of the respondent society, Mr.S.V.Parmar, learned Counsel, has submitted that the mandatory procedure was followed by the respondent society in as much as the agenda was issued and at the said agenda, one of the items was pertaining to the expulsion of the member and, therefore, he submitted that the agenda itself is a notice for giving opportunity to the petitioner for the purpose of his expulsion. Mr.Parmar also submitted that it is not that in every matter, there must be a positive order by the District Registrar for enabling the persons concerned to prefer the appeal. He submitted that in a given case, even if the Registrar remains dormant and there is no order below proposal under Section 36 of the Act, the remedy of appeal can be resorted to. Mr.Parmar also contended that as per the Scheme of the Act, more particularly keeping in view the provisions of Sections 4, 9, 11, 13, 17, 19, 36, 81, 160 etc., so far as the power of admitting the person or removing or expelling him are concerned, it is vested in the District Registrar and hierarchy provided is of the appeal before the District Registrar and revision before the State Government. When the Act has expressly provided the independent machinery, the Nominee

will not get the jurisdiction under Section 96. He submitted that even otherwise also authority to continue the person as a member or not is finally vested with the general board of the Society under Section 36 of the Act. He also submitted that even otherwise also by proviso of Section 36(2) of the Act Registrar has the power to enable the person to be admitted as the member and when the Act has provided a specific remedy by way of proviso of section 36(2), it is deemed that the remedy under Section 96 is not available to a person who is expelled as the member and therefore, in his submission, the Nominee has rightly passed the order and the Tribunal has rightly confirmed the said order of the Nominee. Mr.Parmar also relied upon the judgement of the Apex Court in the case of "Balasinor Nagrik Cooperative Bank Ltd. v. Babubhai Shankerlal Pandya and Others", reported in 87(1) SCC, 606, to contend that after the proposal is forwarded to the District Registrar, he becomes functus officio and, therefore, by virtue of Section 36, it is deemed that the approval is granted. However, he fairly submitted that in the very judgement the Apex Court has kept the question open as to whether the proper remedy would be by way of raising dispute under Section 96(1) of the Act or not.

4. In view of the aforesaid, the first question which will have to be examined is whether the remedy is available to the petitioner of preferring the appeal under Section 153 of the Act in absence of any decision of the District Registrar under Section 36 or not in the matter where the District Registrar has not taken any decision on account of no proper proposal before him. It is true that on behalf of the respondent Society, Mr.Parmar has submitted that the society did forward the proper proposal to the District Registrar under Section 36 of the Act. However, correspondence issued by the office of District Registrar, copies whereof are produced and which have been referred to earlier, shows that it is the stand of the District Registrar that no proper proposal is forwarded by the respondent Society to the office of the District Registrar. As a result thereof, the matter is not considered at all. Section 36 of the Act, which is relevant for the purpose of this petition reads as under:

> "(1) A society may, by resolution passed by three-fourths majority of all the members present and voting at a general meeting of members held for the purpose, expel a member for acts which are detrimental to the proper working of the society:

Provided that, no resolution shall be valid, unless the member concerned is given an opportunity of representing his case to the general body, and no resolution shall be effective unless it is submitted to the Registrar for his approval and approved by him:

Provided further that, the approval or disapproval of the Registrar shall be communicated to the society within a period of three months from the date of such submission, and in the absence of such communication the resolution-shall be effective."

5. The Section provides that if any action of the member which is detrimental to the working of the society, the general body of the society by resolution of the 3/4th majority of the members who are present at the meeting can take the decision for expelling the member concerned. However, the proviso of the said Sub-section 1 of Section 36 provides that the resolution shall not be valid unless the member concerned is given an opportunity for representing his case to the general body and (2) unless it is submitted to the District Registrar for approval and approved by him. So far as the second part of the proviso is concerned, it is further provided that if the approval or disapproval of the Registrar is not communicated to the Society within a period of three months, then in that case, the resolution shall be effective. In view of the aforesaid, it appears that the jurisdiction of the Registrar would start only when the proper proposal is forwarded by the society to the District Registrar for the purpose of granting approval. Further, even before passing the resolution, it is mandatory on the part of the society to give an opportunity of representing the case to the member concerned before the general body. Mr.Parmar has submitted that the agenda is to be treated as the notice to the member concerned for the purpose of making representation for his expulsion. However, I cannot accept his contention for the simple reason that in the agenda, there is no express item for the purpose of expelling the petitioner and the item mentioned in the agenda is general. That apart, even if when any member is to be expelled and his expulsion is to be discussed in the general body meeting on true consideration it appears that there must be express specific notice by the society to the member concerned, including the grounds on which he is to be expelled and the matter is to be discussed for the purpose. The respondent society in the present

case has not been able to show any material from record of this petition that any specific notice was given by the society to the petitioner before taking or before passing resolution at the meeting dated 30-11-1975. Therefore, prima facie, it can be said that the mandatory procedure which was required for the purpose of passing the resolution is not followed. It is true that while granting approval or not granting approval, the District Registrar may consider the said aspect as to whether the mandatory procedure is followed or not, but in a given case if the society passed the resolution without following mandatory procedure and if there is no proper proposal forwarded to the District Registrar found, then I am of the view that the dispute would fall within the jurisdiction of the Nominee under Section 96. Further, in absence of any proposal before the District Registrar, there is no question of taking any decision or even becoming functus officio and, therefore, when the legality and validity of resolution is challenged, it would be a dispute at this stage between the member and the society and in my view, the same would fall under Section 96 of the Act. However, it does not mean that even if the proper proposal is forwarded by the society and the approval is granted or approval is not granted or three months' period is over, the Nominee will continue to hold jurisdiction. If proper proposal is forwarded to the District Registrar and if the approval is granted or not granted, then the only remedy would be as per the decision of this Court in the case of " "Jitendra Natverlal Thaker & Ors." (supra). In the said judgement, at para 6 it has been observed as under :

> "The decision of the opposite party No.1 society to expel the deceased member which has been duly approved by the Registrar would become final under sub-sec. (6) of section 153. If an appeal is preferred, the order passed in appeal would become final. Such a final decision cannot be subject matter of dispute under Section 96 of the Act. It is, therefore, clear that the present dispute as to expulsion of a member did not fall under Section 96 of the Act."

6. Therefore, it is clear in the said case the approval was granted and in the appeal the said decision was confirmed and, therefore, this Court took the view that there is no jurisdiction under Section 96 of the Act. However, in the present case, such is not the situation. In the present case, the resolution is passed and no proper proposal is received by the office of the District Registrar and, therefore, in my view when the

jurisdiction of the District Registrar has not commenced, aforesaid decision has no applicability and the learned Nominee as well as the Tribunal have, in this regard, committed error, which is apparent on the face of the record.

7. So far as the contention of Mr.Parmar regarding the basis of the decision of the Apex Court in the case "Balasinor Nagrik Cooperative Bank Ltd." (supra) that the Registrar had become functus officio and even in absence of the decision, the appeal can be maintained, I am afraid such contention can be accepted. Section 153 of the Act provides that the appeal against an order under Section 4, 9, 11, 13, 17, 19, 36, 81 and 160 shall lie xxx. Therefore, it is abundantly clear that for invoking the appellate jurisdiction of the authority the condition precedent is that there must be an order or decision. In absence of any decision of the District Registrar in the present case, it cannot be said that the appeal can be preferred by the petitioner or rather can be maintained under Section 153 of the Act and, therefore, there is no substance in the contention of Mr.Parmar that even in absence of the decision of the original authority, the appeal can be maintained. Apart from that even if there is a proper proposal and thereafter the power is not exercised within a period of three months for the purpose of granting or rejecting the approval possibly by taking basis of the judgement of the Apex Court, one might contend that the resolution has come into effect by virtue of the section and, therefore, the appeal may be allowed to be maintained. Such is not even a situation in the present case and, therefore, I am of the view that the judgement of Apex Court in the case of "Balasinor Nagrik Cooperative Bank Ltd."(supra) is of no help for the respondent. Moreover, as fairly submitted by Mr.Parmar, even in the last line of the said judgement, the said question is kept open.

8. In view of the above discussion, it is concluded that the learned Nominee as well as the learned Tribunal have committed error, which are apparent on the face of the record and the learned Nominee failed in exercise of power which is vested in him and, therefore, order passed by him and its confirmation by the Tribunal deserve to be quashed and set aside. Hence the order dated 13-11-1991 passed by the learned Nominee below Application Ex.58 Annexure "B" in lavad suit No.56/1984 (old No.2678/76) and the judgement and order dated 26-2-1993 passed by the Gujarat State Cooperative Tribunal in appeal No.367/1991 are quashed and set aside. The lavad suit No.56/1984 is restored to file. The learned Nominee is directed to

decide the suit in accordance with law, preferably within a period of six months from the date of receipt of the order of this Court. It is clarified that the observations made by this Court earlier are prima facie and nominee shall be at the liberty to decide the suit in accordance with law upon the materials available on record. The petition is allowed. Rule is made absolute. There shall be no order as to costs.

31-7-2002 (Jayant Patel, J.)

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